



WASHINGTON STATE HUMAN RIGHTS COMMISSION

PUBLIC FORUM REPORT:

“Farm Workers – Your Rights and Responsibilities as an Injured Worker”

BACKGROUND INFORMATION

The five appointed members of the Washington State Human Rights Commission (the Commissioners) meet on a monthly basis at different locations throughout the state. During the open public session in Kennewick on September 26, 2002, commissioners heard from a representative of the United Farm Workers' Union (UFWU). A focus of her remarks was anecdotal information about problems facing monolingual farm workers in accessing the services of the Washington State Department of Labor and Industries (L & I).

Concerned individuals raised similar issues to the Commission in the past, and at the direction of the Commission, Executive Director Sue Jordan wrote to then L & I Director Gary Moore about these concerns. Mr. Moore shared information about his agency's efforts to reach the farm worker community, including a Spanish language web site. With the cooperation of L & I representatives, the Human Rights Commission conducted a public forum in Yakima on October 24, 2002, titled “Farm Workers: Your Rights and Responsibilities as an Injured Worker.”

OVERVIEW OF FORUM

The Commissioners, along with the Executive Director, Deputy Director, and staff from the Olympia and Yakima offices attended. Representatives of L&I, including Reuel “Monty” Paradis, administrator for Central Washington, attended the forum. Mr. Guadalupe “Lupe” Gamboa, Washington Director of the United Farm Workers Union, Blanca Rodriguez, an attorney with NW Justice Project, a legal aid organization, and Antonio Ginatto from the Commission on Hispanic Affairs also attended. Approximately 75 farm workers were present. HRC provided two Spanish language interpreters.

SUMMARY OF L & I PRESENTATION

Mr. Paradis described the coverage and staffing of his designated area. He introduced three employees from his Yakima office, who were available to speak with the farm workers. An employee from the L&I Olympia office was also present.

Many farm workers are not aware of the rights they have, including, crucially, the right to have a translator to communicate with their doctor and claims manager. They also have a right of non-retaliation when they report unsafe or unhealthy work conditions. Retaliation claims are difficult to document because of the transient nature of the work season. For example, a worker may be in a different part of the state or in a different state, only days after an incident takes place. Gathering evidence is extremely difficult under these circumstances.

Although workers are entitled to translation services from L&I to communicate with their doctors, the workers must express that need to the doctor at the initiation of the claim. The doctor is supposed to relay the request to L&I. The claim orders, however, are in English, because of an archaic computer system at the agency.

Mr. Paradis outlined some of the challenges faced by L & I in serving the farm worker population. He described the jurisdictional requirements of eligibility for L & I: there must be an employer-employee relationship. He clarified that workers have rights to L&I protections regardless of proof of legal residency.

Problems frequently experienced by this working population are related to the nature of their work and the pay structure. For example, workers paid for piece work have every incentive to work through their breaks and lunch hours, and to work quickly, all of which leads to a higher likelihood of fatigue and accidents.

To process a claim, L & I must know the identity of the employer, the dates and hours worked, and the rate of pay. Highly mobile farm workers may not be aware of these essential facts and face challenges in providing documentation to support their claims.

Workers are obligated to follow their doctors' orders, to accept doctor-approved modified work offers, and to return to work when they can.

L&I STEPS TO ADDRESS THE LANGUAGE BARRIER

Jose Rodriguez is the Spanish Language Services Manager for L&I's Bilingual Claims Unit. L&I created this position in June 2002. L&I hired Mr. Rodriguez to do an assessment of L & I services and to conduct outreach, with a focus on Central Washington. Mr. Rodriguez described some developing services which include a Spanish language farm worker hotline and free videos available in Spanish for employers. Mr. Rodriguez participated in Spanish radio shows sponsored by the Consul General of Mexico on various topics including ergonomics, industrial insurance claims, pesticides, filing claims with L & I, crime victims' issues, and workers' rights.

Mr. Rodriguez is working towards simplifying forms and pamphlets in Spanish, but he noted some drawbacks already evident in that process, including unclear or inaccurate translations of information.

SUMMARY OF HRC PRESENTATION

The HRC staff conducted an overview of the Washington State Law Against Discrimination (RCW 49.60), as it relates to discrimination in places of public accommodation and employment, with an emphasis on reasonable accommodation for persons with disabilities, including temporary disabilities.

DESCRIPTION OF PUBLIC TESTIMONY

Guadalupe "Lupe" Gamboa, Washington Director of the UFWU, introduced the workers present for the evening. Mr. Gamboa described his own background as the son of migrant workers, himself a farm worker, and the first in his family to attend college and then law school. Mr. Gamboa was the director of Evergreen Legal Service's Farm Worker Division for ten years, and he spoke to some overarching issues facing farm workers.

- **Basic inequity in delivery of services.** L & I, which is a large agency, does not enforce "the law" as it affects minority, non-English speaking farm workers. If white, voting workers at Boeing or longshoremen were as frequently injured and killed as farm workers, the response would be vastly different. Farm workers did not even have full coverage under L&I laws until the 1980's, and they still have no collective bargaining rights. Mr. Gamboa commented that many L&I employees are still "old school" in terms of disfavoring the population he represents.
- **The issue of piecework is significant.** Since minimum wage has been increased, piece workers have to work even harder to earn a living. Worker's compensation is the biggest problem. It is cheaper for employers to allow workers to be injured than to make working conditions safe. Workers are expendable. There were 49 fatalities among farm workers in one year.

- **Needs are unmet for this population.** The system is not working well. Information in Spanish should be sent to injured workers who do not speak English. The deadlines on the forms for filing claims are in English, and monolingual workers lose their rights to file because they miss the deadlines.
- **Cultural divisions create a lack of understanding.** L&I claims managers are in Olympia, and none of them speak Spanish. They also have no understanding about what agricultural work entails, and make unrealistic assessments of when an injured worker can return to a physical job, the demands of which are different from those of a desk job.
- **Once a claim is filed, there are problems accessing adequately competent doctors.** There is a lack of specialists who are willing to take L&I claims. Then there are individual medical review panels that often come in and second-guess the treating physician's assessment of the worker's needs.
- **Even when a claim is accepted, there is a strong risk of retaliation.** Retaliation rates are very high, and protection from retaliation is absent. When retaliation claims are filed with the agency, L&I only finds that five percent (5%) of those claims have merit. The law sounds good, but it's not being realized.

When invited to respond, Mr. Paradis acknowledged that a great deal of the limitations in L&I services to farm workers is inherent in the way the laws are written. Large employers dominate the agricultural work force. Farmers in this area aren't family farmers, they're large agribusinesses that have influenced the way the law is written, (and therefore, enforced). For example, tractor rollover deaths in agriculture settings are exempted from coverage by statute; a product of lobbying by the agricultural farm lobby. Twenty three (23%) percent of all workers who are killed are killed in rollover accidents.

PUBLIC TESTIMONY

The commission heard from eleven farm workers and other interested individuals. Many more people were present, and several translators were used. The Chair acknowledged and thanked the workers who have long working hours and early mornings for their dedication and efforts in attending this evening meeting. The people who spoke to the Commission were:

Ms. Maria Hortado
 Mr. Javier Chavez
 Ms. Graciela Gutierrez
 Mr. Senovio Nunez
 Mr. Jesus Hernandez
 Ms. Julia Parra
 Mr. Pedro Eliosa

Mr. Hugo Pastor
Ms. Elba Ramos
Ms. Blanca Rodriguez
Mr. Antonio Rivera-Sanchez

THEMES

The nature of farm work differs from the traditional employment that L&I is geared to serve.

- Piecework
- Seasonal
- Migratory
- Record keeping problems
- Disability accommodation (what would qualify as "light-duty" on a farm?)
- Limitation of laws (e.g. tractor roll-overs)

Language barriers present a range of limitations on farm workers' access to services. Though L&I is making efforts to address these, the limitations are widespread and significant.

- Materials - translations hit and miss
- No place to indicate language needs on incident report
- Claims managers not bilingual
- Olympia staff can't even say "wait one minute" to access foreign language phone services
- Translators for medical doctors are needed

Enforcement of workers' rights is ineffective and often undermined.

- Surprise safety inspections are being illegally circumvented as farm owners/managers are being given advance warning of inspections,
- Mobile nature of the work force, the lack of effective information about rights, and the perception and reality of being considered expendable.

Doctors

- Not willing to take on L & I cases,
- Do not speak Spanish and may not be aware of their role in obtaining L&I translators to interact with the client,
- Little economic incentive to take L & I cases, which pay little, and require cumbersome documentation. L & I is slow to remit payment.

Retaliation

- The law protects workers from retaliation for filing an L & I claim; however, only five percent (5%) of retaliation claims are found to have merit.
- L&I slow in investigating; there are currently 150 outstanding farm worker claims.

An even larger concern is effective communication between L & I and the farm worker community.

CONCLUSIONS AND RECOMMENDATIONS

The struggles of farm workers are in many ways the classic ones that have faced waves of new immigrants entering American society. They are disenfranchised, poor, do not speak the mainstream language, and take the low-paying, dangerous jobs that more established residents will not take. The demographic and political reality is that the Hispanic population is rapidly increasing, and will soon comprise a proportion of the population whose impact cannot be denied. Even if that were not the case, in the 21st Century United States, we should be able to establish a level of human dignity and afford these workers the human rights that may have been denied our own ancestors.

Where services of agencies like L & I and HRC are made accessible to the most vulnerable and least enfranchised populations, these access improvements benefit the remainder of the population, because they, too, will benefit from greater ease of access. Plausible, achievable goals relevant to this forum include:

- **Improving awareness and delivery of services that farm workers are entitled to.** The Spanish language outreach program, the L & I web site, Spanish language hot line and other measures undertaken by L & I are all promising indications of movement in this direction. There is still clearly room to improve. Existing non-governmental agencies (such as UFWU) that serve these workers' needs can and should be engaged by the agency as active partners in informing the community of their rights and responsibilities. The agency should be vigilant and responsive to input from these sources to learn where the gaps in service lie, and how services can be improved.
- **Active cooperation of state agencies L&I, HRC, and Washington State Department of Financial Institutions (DFI), which investigates unfair lending practices.** Many agencies have related missions. For example, HRC enforces whistleblower retaliation and many employment laws. When a farm worker experiencing retaliation for reporting an unsafe working condition attempts to complain to HRC, HRC staff should be fully informed to assist that worker in accessing the correct agency for enforcement, and should have

access to basic information about the sister agency, such as jurisdiction and time limits for filing claims. We should dovetail our outreach and education programs, acknowledging that we serve many needs for the same populations.

GOALS AND ONGOING PROJECTS

Improving targeting and identification of service within L & I and the HRC:

As an example, following the Yakima Forum, Executive Director Sue Jordan met with Annette Taylor, Discrimination Technical Advisor for L & I. Ms. Taylor's division has five staff members, who process claims of discrimination based on retaliation for using the Workers' Compensation System in Washington, pursuant to RCW 51.48.025. A worker with a claim of such retaliation can reach her division at (360) 902-6568.

As a result of information gained at this forum, HRC staff can more effectively direct retaliation claims made to HRC to L & I. (Please see the attachments for factors that distinguish between an L & I retaliation claim and an HRC retaliation claim.

Ms. Taylor also can arrange presentations to members of the public regarding L & I's process. As a result of conversations with HRC staff, L&I is striving to make it easier to find retaliation information on its web site, both in English and in Spanish. As a result of increased communication following the forum, HRC staff also advised L & I staff in making cross-referrals to the HRC on appropriate issues.

Questions and complaints about workplace safety issues should be addressed to Discrimination Manager Don Butler, who is the WISHA coordinator for L & I. Mr. Butler can be reached at (360) 902-5480.

RECOMMENDATION

During the forum, participants clearly expressed that L&I claim forms, which are necessary to initiate the process for injured workers to access the agency, should advise the claimant the treatment provider in English and Spanish, that if an interpreter is needed, one will be provided.

PLAN FOR THE FUTURE

Conducting forums such as this is helpful to bring together representatives of agencies with common missions and customers and can be very productive. Forums serve to increase understanding and communication among the client populations and the agencies. This is the first step to addressing the issues raised, not the end of the road. Such forums should be the jumping off point for increased, ongoing engagement with the subject communities, through focus groups, networking, ongoing identification of needs and obligations.

ATTACHMENTS:

Human Rights Commission and Labor & Industries Intake Protocol

Minutes from October 24, 2002 Washington State Human Rights Commission Meeting

CONTACT INFORMATION FOR THE WASHINGTON STATE HUMAN RIGHTS COMMISSION:

VISIT OUR WEBSITE AT: <http://www.wa.gov/hrc>

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THIS REPORT IS AVAILABLE IN ALTERNATE FORMATS

**WASHINGTON STATE HUMAN RIGHTS COMMISSION
MEETING OF
October 24-25, 2002
Oxford Suites
Yakima, WA**

MINUTES

THURSDAY, OCTOBER 24, 2002

PUBLIC FORUM

“Farm Workers: Your Rights and Responsibilities as an Injured Worker”

ATTENDANCE

Commissioners: Rudy Vasquez, Commission Chair; Charlotte Coker; Ellis Casson; Dallas Barnes; and J. Reiko Callner.

Staff: Susan (Sue) J. Jordan, Executive Director; Dariush (D.K.) Khaleghi, Deputy Director; Tanya Calahan, Commission Clerk; Arthur Stratton, District Manager; Sharon Ortiz, Field Service Manager; San Juanita Soto and Pam Drotning, Equal Opportunity Compliance Investigators; Christina Mendoza, Office Assistant Senior; Susan Carlson, Assistant Attorney General.

Guests: Raul “Monty” Paradis, Jose Rodriguez, Marla Gallegos, Ramon Benavides, WA State Department of Labor & Industries; Lupe Gamboa, United Farm Worker’s Union; Antonio Ginatta, Commission on Hispanic Affairs; Heliodoto Ramirez; Moises Sandoval; Ruben Escobar; Javier Chavez; Pedro Eloisa; Armondo Tapia Aguilor; Alice Lara; Julio Parona; Jesus Hernandez; Nabor Escobar; Maria Para; and Avelino Baraja. There were many others in attendance. However, they did not sign in.

OPENING

The meeting was called to order at 6:30 p.m. by Commissioner Vasquez. He explained the role of the Commission and the purpose and format of the forum. Commission staff introduced

themselves to the audience.

WA STATE DEPARTMENT OF LABOR & INDUSTRIES PRESENTATION

Raul “Monty” Paradis spoke on behalf of WA State Department of Labor & Industries (L&I). Mr. Paradis explained the activities that L&I is engaged in to address the needs of farm workers and limited English speaking and monolingual individuals in accessing L&I services. He explained worker rights and responsibilities. Retaliation complaints and the retaliation complaint process was discussed.

Jose Rodriguez spoke about his role at L&I. He is working with Mr. Paradis, farm worker advocacy groups, Columbia Legal Services, the Governor’s office, and others on various projects to address the needs of Spanish speaking individuals in accessing L&I programs and services. As part of this effort L&I staff is working to simplify forms, pamphlets, and brochures.

UNITED FARM WORKERS UNION PRESENTATION

Mr. Lupe Gamboa spoke on behalf of United Farm Workers Union (UFW). He talked about the challenges faced by injured farm workers. Specifically, he mentioned the number of on the job fatalities and injuries. He touched on concerns regarding the limited number of Spanish speaking L&I staff in the Yakima area and difficulties with the L&I claims process. A survey was conducted about the L&I claims process. Eighty-nine percent of those surveyed indicated that they were dissatisfied with the process. He shared information about 150 individuals who feel that their L&I claims were improperly handled. Mr. Gamboa will provide information about these cases to the Commission through the Clerk.

WA STATE HUMAN RIGHTS COMMISSION PRESENTATION

Field Service Manager Sharon Ortiz and Equal Opportunity Compliance Investigator San Juanita Soto gave a presentation about the jurisdiction of the Commission. They focused on disability and national origin discrimination. They explained the complaint process from intake of the complaint to the investigative finding. They also explained how complaints result in “no reasonable cause” and “reasonable cause.” Ms. Ortiz and Ms. Soto explained rights and responsibilities under the Law Against Discrimination.

OPEN FORUM

Many individuals from the audience addressed the Commission. Concerns were expressed about various farm worker issues such as on the job injuries and deaths; the lack of light duty work; slow payment of claims; denied claims; concerns about L&I doctors and retaliation. A participant made a suggestion that Spanish radio be used to publicize farm worker rights and responsibilities.

On behalf of the Commission, Commissioner Vasquez thanked everyone in attendance for coming to the public forum. He stated that the Commission will generate a report and distribute it as follow up to the public forum.

ADJOURNMENT

There being no further business, the meeting adjourned at 9:40 p.m.

Respectfully submitted,

Tanya Y. Calahan
Commission Clerk

Basic Intake Protocol for Determining if Caller should be with WSHRC, L&I or Both Agencies

- If the caller has filed an L&I claim, or has told the employer that s/he intends to file an L&I claim, and then the caller feels that s/he was retaliated against by the employer, this should be referred to L&I. The contact person is as follows:

Annette Taylor, Discrimination Technical Advisor
Department of Labor and Industries
Legal Services
P.O. Box 44277
Olympia, WA 98504-4277
(360) 902-6568

- If the caller has not been injured on the job, or has not filed with L&I, or does not intend to file with L&I, then listen for elements which constitute retaliation under RCW 49.60, i.e., does the caller have a current complaint with the WSHRC and now the employer has taken a new, bad action, or did the caller mention her/his rights under RCW 49.60 to the employer and was then subjected to bad treatment?
- In some instances it will be appropriate for the caller to file a complaint with both agencies. This is due to the fact that the employer's motive for the bad action against the employee may not be known until after an investigation is completed.

Factors that Distinguish a WSHRC Employment Retaliation Claim From an L&I Retaliation Claim *

The Washington Law Against Discrimination (WLAD), RCW 49.60

- Is the Employer Covered? WLAD defines an "employer" as "any person acting in the interest of an employer directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." RCW 49.60.040(4).
- Is the Employee Covered? WLAD's anti-retaliation clause covers "any person" who opposes any practices made unlawful by this statute or who has testified or assisted in a proceeding under this statute.
- Anti-Retaliation Provision: RCW 49.60.210 makes it unlawful for employers to: "discharge, expel, or otherwise discriminate against any person because he or she has

opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter."

- Administrative Remedy: An employee who wishes to pursue a retaliation claim under the WLAD may, but is not required to, file a charge with the Washington State Human Rights Commission within 180 days of the last discriminatory act. RCW 49.60.230(2).
- Statute of Limitations: Three years (to file a claim in court).
- Damages: Injunctive relief, actual damages, as well as attorneys' fees and costs. No punitive damages. RCW 49.60.030(2).

Industrial Insurance Act (IIA), RCW Title 51

- Is the Employer Covered? The IIA defines the term "employer" as "any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers." RCW 51.08.070 (see remainder of statute and RCW 51.08.195, and RCW 51.12 et seq. for exceptions).
- Is the Employee Covered? A "worker" means "every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment. ..." RCW 51.08.180(1) (see remainder of statute and RCW 51.08.195, and RCW 51.12 et seq. for exceptions).
- Anti-Retaliation Provision: "No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title."
- Administrative Remedy: To pursue a claim under the IIA, the employee "may file a complaint with the director alleging discrimination within ninety days of the date of the alleged violation. Upon receipt of such complaint, the director shall cause an investigation to be made as the director deems appropriate. Within 90 days of the receipt

of a complaint filed under this section, the director shall notify the complainant of his or her determination." RCW 51.48.025(2). The matter may be referred to the Attorney General's office if the investigation yields a determination that there is cause that discrimination occurred. But, "if the director determines that [the anti-retaliation provision] has not been violated, the employee may institute the action on his or her own behalf." RCW 51.48.025(3).

- Statute of Limitations: To pursue an administrative action under this statute, the employee must file a complaint within 90 days of the date of the alleged violation. RCW 51.48.025(2). However, if the claim is for retaliatory discharge, the employee has three years to pursue a claim for wrongful termination in violation of public policy.
- Damages: The superior court has jurisdiction "for cause shown, to restrain violations of [the anti-retaliation provision] and to order all appropriate relief including rehiring or reinstatement of the employee with back pay. RCW 51.48.025(4). Damages available for wrongful termination in violation of public policy claims are much broader, and include general, economic and compensatory damages; and attorneys' fees, if the employee suffered wage loss.

February 2003

* These factors were drawn from an article by Maria C. Fox, Esq., "Retaliatory Discharge Claims for Injured Workers and Those Who Stand Up for Them", presented at a Washington State Bar Continuing Legal Education program on December 12, 2002.